No. 18498

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 1065, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order against

[1] The pertinent statutory provisions are reprinted *infra*, pp. 21-22, as Appendix A.

respondent issued on September 25, 1962. The Board's decision and order (R. 38-40)[2] are reported at 138 NLRB No. 94. This Court has jurisdiction, the unfair labor practices having occurred in Salem, Oregon, where the employers involved herein are engaged in the building and construction industry, an industry affecting commerce within the meaning of the Act (R. 18-19). No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8(b)(4)(i)(B) of the Act by inducing and encouraging individuals employed by a general contractor and two of its subcontractors to engage in a strike or a refusal to perform services with an object of forcing the general contractor to cease doing business with its nonunion roofing subcontractor. The Board further found that respondent, by the above conduct, threatened, restrained and coerced the general contractor and three of its subcontractors in furtherance of the same object, in violation of Section 8(b)(4)(ii)(B). The facts underlying the Board's findings are summarized below.

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[2] References to the pleadings, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the hearing, reproduced pursuant to Rules 10 and 17 of this Court as "Volume II, Transcript of Record," are designated "Tr." "G.C.Exh." refers to exhibits of the General Counsel. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

A. *Background*

M. L. Mills Construction Company ("Mills"), a general contractor in the building and construction industry, is, and at all material times has been, a member of the Willamette General Contractors Association. In July 1959, the Association, on behalf of all its members, entered into a collective bargaining agreement with the Oregon Council of Carpenters, the latter acting on behalf of respondent and other constituent local unions. The contract was to last for three years from its effective date and provided, *inter alia*, that no contractor should subcontract any work to a subcontractor who did not establish for its employees all the terms and conditions set forth in the contract.[3] (R. 19; G.C. Exh. 1(k), p. 5). This contract was in effect at the time the events herein occurred.

B. *The dispute*

During the fall of 1961 and continuing into 1962, Mills was engaged in the construction of a 30-unit apartment building in Salem, Oregon (R. 18-19; Tr. 37, 85). As general contractor, Mills performed part of the work itself. However, it subcontracted out various portions of the work, as follows: plumbing work to C. J. Hansen Company ("Hansen"); electrical work to Lloyd J. Bartlett ("Bartlett"); sheet

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[3] The contract provided as follows (GCX 1(k), p. 5): "No contractor covered by the terms and conditions of this Agreement shall subcontract any work to a subcontractor who does not establish for his employees all requirements and conditions as set forth in this Agreement and Schedule 'A' attached [relating to wage rates]."

metal work to Wesley E. Gladow ("Gladow"); and shingle roofing work to Jack L. Largent Construction Company ("Largent"). All of Mills' employees are members of respondent Union; Hansen, Bartlett and Gladow employ plumbers, electricians and sheet metal workers, respectively, who are members of building trades unions affiliated with the AFL-CIO. (R. 19; Tr. 91, 95, 102). Largent, however, employs men who are not members of any labor organization (R. 19; Tr. 12, 116-117).

In early December 1961, Largent started applying shake shingles to the roof of the apartment (R. 19; Tr. 61, 108). Shortly thereafter, when respondent's business representative, Ralph Myers, was visiting the jobsite, he asked Largent's foreman, Bill Henry, what contractor was doing the work. (R. 19; Tr. 107-108) Henry named his employer, and Myers asked how the carpenters were being paid. Henry replied that they were being paid by the square (R. 19; Tr. 108).[4]

On December 5 or 6, 1961, Myers telephoned Mills and asked why Mills had non-union shinglers on the job. (R. 19; Tr. 61, 63-64, 106) Mills answered that he didn't know whether or not Largent's employees were nonunion, but that to his knowledge, Largent was the only roofing subcontractor available to apply shake shingles. Myers suggested that Mills' own men could do the work, and Mills replied that his men

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[4] The significance of this method of payment lies in the fact that it is not the manner (hourly) called for by respondent's contract with the Association (R. 19; Tr. 109, G.C. Exhibit 1(k), pp. 28-30).

didn't want it (R. 20; Tr. 61). Myers then said that "the Carpenters claim shingling" and Mills again stated that Largent "was the only man available to put them on, and I have a contract with him." Myers ended the conversation by saying, "Well, we'll have to see what we can do." (*ibid.*)

On that day or the next, Myers wrote a letter to the Oregon State Council of Carpenters stating, among other things, that Mills had subcontracted with an employer "who does not qualify" under the provisions of the contract and that Mills had also failed to abide by a contract provision requiring the reporting of "new job hires." (R. 20; Tr. 17; G.C. Exhibit No. 3) The letter closed with a request that the Council set up a joint conference board to arbitrate these "problems" (*ibid*).[5] The Council's executive secretary, George Hann, wrote to "Pat" Blair, executive secretary of the Association, on December 6, requesting a meeting of the joint conference board and enclosing a copy of Myer's letter (R. 20; Tr. 18; G.C. Exhibit No. 2).

On December 21, Blair replied, stating that Largent had submitted the lowest bid and had properly been awarded the contract, and that Mills intended to honor that award. He also informed Hann that the Association could not require Largent to abide by all terms and conditions of the contract with the Council since this would entail the execution of a

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[5] Article XV of the contract between respondent and Mills provides for the submission of disputes arising out of the contract to a Joint Conference Board (G.C. Exhibit No. 1(k), pp. 22-24).

labor agreement by Largent. He closed by stating that the Largent matter "is beyond our control and our attempt to apply the union security provision of the agreement to this firm would be a violation of the Labor-Management [Relations] Act of 1947 as amended." (R. 20; Tr. 18-19, G.C. Exh. No. 4).

C. *Respondent's conduct and the effect thereof*

On December 28, 1961, after the employees had commenced work for the day, respondent placed a picket at the entrance to the construction site (R. 20; Tr. 37). The picket carried a sign which read (R. 9, 12, 20):

> Mills Construction Company Is in Violation of Agreement With Carpenters Local 1065

Leon Schiedemann, Mills' working carpenter foreman, and one of Bartlett's employees, asked the picket why he was there. He answered that he didn't know. (R. 20; Tr. 36, 37, 41, 54) Schiedemann and the electrician then telephoned respondent, but could not reach the business agent. They left word for him to call, but never heard from him (R. 20; Tr. 38). On the next day, the picket was on the site when the workmen arrived. Three of Mills' employees immediately went to respondent's union hall to see Myers. The office was locked, however, and they returned to work (R. 20; Tr. 43, 51-52). On the next working day, January 2, 1962, Paul Wallace, one of Mills' employees, telephoned Myers and asked about the picket. Myers told him that the picket was there to advertise that Mills was unfair to the Union. Asked

if members should cease work, Myers replied that he couldn't answer at that time but that Wallace should call him at home that evening (R. 20; Tr. 52-53). When Wallace asked if Mills' employees would be subject to a fine if they continued working, Myers answered that a majority of the union members would have to decide that question at a meeting (R. 20; Tr. 53-54).[6]

On December 28, James Brown, who was employed by the plumbing subcontractor, Hansen, arrived for work at the Mills construction project, saw the picket and returned to Hansen's shop. (R. 21; Tr. 87). He told Hansen's general foreman that there was a picket at the place where he was supposed to work (*ibid.*) The foreman, Robert Hansen, sent Brown to another job and then went to the Mills construction site himself to "see what the picket was about" (R. 21; Tr. 87). Asked whether he was an "official AFL picket," the man replied that he didn't know and that Hansen should call Myers. When Hansen tried to call Myers he could not reach him. He then called the business agent for the Plumber's Union, who said he would investigate (R. 21; Tr. 87-88). Thereafter, on two occasions, Hansen sent men to the construction site, but they returned to the shop on seeing the picket. (R. 21; Tr. 68; 88-89). After further discussion, the

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[6] Article XI of the Union's contract with the Association provides, *inter alia,* that "employees covered by this Agreement shall not be expected to pass through a picket line which has been duly authorized by an AFL-CIO County or Building Trades Council * * *" (G.C. Exhibit 1(k), pp. 19-20).

Plumber's business agent sent Hansen a man who would cross the picket line (R. 21; Tr. 91).

Bartlett, Mills' electrical subcontractor, had two employees working at the construction site when picketing commenced. (R. 21; Tr. 93-94) They finished the day's work, but refused, on the following day, to cross the picket line. These employees called Bartlett, who told them he would get in touch with Jack Schiller, business agent for the Electricians Union (R. 21; Tr. 94-95). Bartlett called Schiller and asked for instructions. Schiller said that he had none to give, but when he was informed that other trades were not "honoring the picket line," said "some of them are going to be awfully sick before they are through with this" (R. 21; Tr. 96-97). As a result of this conversation, Bartlett "pulled off the job." However, a week or 10 days later, Bartlett and his men went back to work because "other crafts were going back" and their business agent would not tell them "in so many words" to stay off the job. (R. 21; Tr. 97)

On January 2, 1962, Gladow, the sheet metal subcontractor, sent his shop foreman to the construction site to take certain measurements preparatory to Gladow's starting work (R. 21; Tr. 101-102). The foreman returned to tell Gladow that there was a picket at the job and that he had not crossed the line. (R. 21; Tr. 102) Gladow called Westergard, business agent for the Sheet Metal Workers Union, and asked if the Mills picket was "legal" and should be honored. Westergard answered yes to both questions. (*ibid.*) Later, upon learning that other crafts

were working, Gladow called Westergard to ask him if this changed the Metal Workers' position. Westergard repeated his previous answers, and Gladow never sent any of his employees back to fulfill his subcontract. (R. 21; Tr. 103)

The picket was removed on February 20, 1962, in accordance with an agreement to arbitrate reached during the course of a District Court proceeding for injunctive relief from the picketing. (R. 21; Tr. 82-83)[7]

II. The Board's conclusions and order

The Board found that respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging employees of Mills, Bartlett and Hansen to engage in a strike or refusal to perform services, and by threatening, restraining and coercing Mills, Bartlett, Hansen and Gladow, all with an object of forcing or requiring Mills to cease doing business with Largent (R. 22-26, 38).

The Board's order directs respondent to cease and desist from the unfair labor practices found as to the named employers or any other employer and their employees (R. 39). Affirmatively, the order requires posting of the usual notices (R. 39-40).

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[7] The arbitration hearing was conducted on March 13, 1962, but no decision had been reached at the time of this hearing (R. 21, n. 4; Tr. 113).

ARGUMENT

The Board Properly Found That Respondent Sought To Compel Mills To Cease Doing Business With Largent, In Violation of Section 8(b)(4)(i) and (ii)(B) of the Act

A. *Introduction—the issue defined*

Section 8 (b) (4) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, provides, in relevant part, that it shall be an unfair labor practice for a union or its agents:

> (i) to engage in, or induce and encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to * * * perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce, where in either case an object thereof is:
>
> * * * *
>
> (B) forcing or requiring any person to * * * cease doing business with any other person * * *

This section thus renders unlawful, as did the corresponding provisions of the 1947 Act, the involvement of neutral employers and their employees in disputes not their own, where an object is to force the cessation of business relations between such neutral employers and any other person. Congress, by enacting the 1959 amendments, made no significant change in the unlawful objectives proscribed by the secondary boycott provisions of the Act. Congress did, however, substantially broaden the scope of the prohibition against conduct aimed at achieving those objectives.

Thus, subparagraph (i) now contains a specific prohibition against the inducement of an individual employee to cease work, and is no longer limited to the inducement of "concerted" refusals, as was the case under the 1947 Act. *N.L.R.B.* v. *International Hod Carriers, Local 1140*, 285 F. 2d 397, 402 (C.A. 8), cert. denied, 366 U.S. 903; *N.L.R.B.* v. *Highway Truckdrivers Local 107*, 300 F. 2d 317, 319, 322 (C.A. 3); *N.L.R.B.* v. *Local 294, Teamsters*, 298 F. 2d 105, 107-108 (C.A. 2); and compare *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 98; *Joliet Contractors Assn.* v. *N.L.R.B.*, 202 F. 2d 606, 612 (C.A. 7), cert. denied, 346 U.S. 824. And in subparagraph (ii), Congress introduced a new provision making it unlawful for a union to "threaten, coerce or restrain any person engaged in commerce" for the purpose of achieving any of the proscribed secondary objectives. This provision proscribes a union's threats to neutral employers of "labor trouble or other consequences" [8] as well as the carrying out of such threats by means of a "strike or other economic retaliation." [9] *N.L.R.B.* v. *Highway Truckdrivers Local 107, supra* at 320-321; *N.L.R.B.* v. *International Hod Carriers, Local 1140, supra; Local 901, Teamsters* v. *Compton*, 291 F.2d 793, 797 (C.A. 1).

The gravamen of the Board's finding in this case is that respondent, in order to force nonunion subcon-

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[8] *Legislative History of the L.M.R.D.A. of 1959* (G.P.O. 1959) (hereafter called "Leg. Hist."), Vol. II, p. 1568(2). And see II Leg. Hist. 1750(1).

[9] II Leg. Hist. 1523(1), 1581(1).

tractor Largent off the construction job, engaged in unlawful secondary activities, both against employees of the contractors and against the contractors themselves. As we show below, substantial evidence supports the Board's findings with regard to respondent's conduct and its object in engaging in such conduct.

B. *The Board's findings are supported by substantial evidence*

As shown in the Statement, upon learning that nonunion subcontractor Largent was working on the Salem construction job, respondent contacted Mills, informed him of Largent's nonunion status and of respondent's objection thereto, and insisted that Largent be removed from the project because it did not adhere to the terms of the Union's contract with Mills. When Mills informed the Union of its intention to honor its contract with Largent, respondent began to picket the job site with signs declaring that Mills was "in violation of [its] agreement with Carpenters Local 1065." As a result of this picketing, certain of the employees of general contractor Mills and of subcontractors Hansen and Bartlett engaged in partial or total work stoppages. In addition, subcontractor Gladow, upon learning from his foreman that picketing was taking place and, having been informed by the Sheet Metal Workers' Union that this picket was "legal" and to be honored, declined to fulfill his subcontract. As respondent clearly intended its picketing to bring about a strike or work stoppage which would force Mills to cease doing business with Largent, the Board's conclusion that re-

spondent thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act is manifestly proper. *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 688-689; *N.L.R.B.* v. *Bangor Bldg. Trades Council*, 278 F. 2d 287, 289-290 (C.A. 1); *N.L.R.B.* v. *Plumbers Union of Nassau County*, 299 F. 2d 497, 500-501 (C.A. 2).

Respondent contends that its primary dispute was not with Largent but with Mills. In support of this contention, it asserts that the picketing was not intended to compel Mills to cease doing business with Largent but rather to compel Mills to live up to the terms of its contract commitment, i.e., to subcontract only to employers who established terms and conditions of employment as set forth in the Union's contract. This contention was properly rejected by the Board. Respondent's ultimate objective, as expressed in its contract with Mills, was to maintain union working standards on the project. It cannot be successfully disputed, therefore, that its primary dispute was with Largent, the only nonunion employer on the job. As noted by the Board (R. 23), Mills' employees were members of the Union and were undoubtedly working for union wages under union conditions. Thus, the heart of the Union's dispute was not with Mills or with any of the union subcontractors, but with Largent, who was "not complying with the terms of the Carpenters' labor agreement" as to "wages, health and welfare" (Tr. 116-117). See, e.g., *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 150, 152-153 (C.A. 9); *N.L.R.B.* v. *Bangor Bldg. Trades Council*, *supra*. And the only

way Mills could end the dispute was by putting Largent off the job, an object proscribed by Section 8 (b) (4) (B) of the Act.

Nor can respondent exculpate itself, as it seeks to do in its Answer to the petition for enforcement,[10] by seeking to denominate Mills as the primary disputant and the abrogation of Largent's subcontract as no more than an incidental effect of this "primary" activity. To be sure, respondent had a dispute with Mills—but, as we have shown, the very basis of that quarrel was the nonunion status of Largent, with whom Mills was doing business,[11] a status that could be altered only by Largent. Thus, Largent was "the target of the [Union's] dispute, and [Mills] was, as the employer in the typical secondary boycott situation, powerless to end the dispute except by breaking off business relations with [Largent]." *Local 636, Plumbers* v. *N.L.R.B.*, 278 F. 2d 858, 864 (C.A. D.C.).[12] It is, of course, of no moment that respond-

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[10] As an affirmative defense to the petition for enforcement, respondent contends that "it was engaged in picketing for the sole purpose of enforcing the arbitration provision of the contract" between itself and Mills (R. 45).

[11] "[The Union] argues that * * * the only dispute was between the Union and [Sound Shingle Co., whom they struck] * * *. The only dispute between the Union and [Sound Shingle] was over the latter's use of unfair shingles, and had no bearing on wages, working conditions, etc. In such a case, a strike called by the Union can have no other purpose than to compel the Company to cease using what the Union considers unfair shingles." *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 151, 152 (C.A. 9).

[12] The Supreme Court, in an early and leading case, pointed out the fallacy in such an argument as respondent's. In

ent may not, at the time of the events herein, have had an active dispute with the primary employer, Largent. As this Court has noted, " * [W]here the facts otherwise establish a secondary boycott practice violative of section 8(b)(4)(A) [the predecessor of Section 8(b)(4)(B), the section here involved] it is immaterial whether the union is engaged in a labor dispute with the primary employer." *N.L.R.B.* v. *Local Union No. 751, Carpenters,* 285 F. 2d 633, 639; accord, *N.L.R.B.* v. *Washington-Oregon Shingle Weavers,* 211 F. 2d 149, 152-153 (C.A. 9); *N.L.R.B.*

N.L.R.B. v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, unions had picketed a general contractor's project because of the presence of one subcontractor's non-union employees (*id.* at 677-679). The Board found a violation of the predecessor section to 8(b)(4)(B). In the Supreme Court, the unions contended "that they engaged in a primary dispute with [the general contractor] alone, and that they sought simply to force [him] to make the project an all-union job" (*id.* at 688). Holding with the Board, the Court said, in rejecting this characterization (*ibid.*): "If there had been no contract between [the general contractor] and [the subcontractor] there might be substance in [the] contention that the dispute involved no boycott. If, for example, [the general] had been doing all the electrical work on this project through its own non-union employees, it could have replaced them with union men and thus disposed of the dispute. However, the existence of the subcontract presented a materially different situation. The nonunion employees were employees of [the subcontractor]. The only way that respondents could attain their purpose was to force [the subcontractor] itself off the job. This, in turn, could be done only through [the general's] termination of subcontract. The result is that the [union's] strike, in order to attain its ultimate purpose, must have included among its objects that of forcing [the general] to terminate that subcontract."

v. *Local 11, Carpenters*, 242 F. 2d 932, 934-935 (C.A. 6).

Moreover, even assuming *arguendo* that one of respondent's objects [13] may have been to compel Mills to arbitrate, this would still provide no justification for respondent's conduct. The decision of the Supreme Court in *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, is dispositive. There, as here, a union charged with subjecting a secondary employer to pressures prohibited by Section 8(b)(4) in order to force a cessation of business with a primary employer whom it considered nonunion, claimed in defense that it was simply enforcing a lawful contract clause. But the Supreme Court held, as did the Board here (R. 38, n. 1), that conduct prohibited by the secondary boycott sections of the Act "in the absence of a hot cargo provision [is] likewise prohibited when there is such a provision." 357 U.S. at 106. In this Court's words, "An attempt to force one employer to sever business relations with another person is not protected by virtue of reliance upon a contract with the employer." *N.L.R.B.* v. *International Union of Operating Engineers, Local 12*, 293 F. 2d 319, 322; accord, *N.L.R.B.* v. *Bangor Bldg. Trades Council*, 278 F. 2d 287, 290 (C.A. 1); *New York Mailers Union No. 6*

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[13] It is settled law that the secondary object need not be the *sole* object; "if one alternative purpose of a strike is an unlawful one within the purview of [the Act], that purpose must be regarded as 'an object' within the compass of the [secondary boycott] section." *N.L.R.B.* v. *International Union of Operating Engineers, Local 12*, 293 F. 2d 319, 323 (C.A. 9); accord, *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689.

v. *N.L.R.B.*, —— F. 2d —— (C.A.D.C.), 52 LRRM 2433, 2434 (decided February 14, 1963). And see *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 151 (C.A. 9).

C. *Respondent's other arguments are without merit*

1. Before the Board, respondent contended that the evidence failed to establish any inducement of employees of neutral employers. The record is to the contrary, however, as respondent cannot deny that it posted a picket at the entrance to the job site carrying a picket sign reciting that Mills was in violation of its contract with the Union. This alone, under settled law, constitutes inducement and encouragement of employees within the purview of Section 8 (b) (4). *I.B.E.W.* v. *N.L.R.B.*, 341 U.S. 694, 700-705; *N.L.R.B.* v. *Laundry, Linen etc., Drivers*, 262 F. 2d 617, 620 (C.A. 9). Moreover, the record contains ample evidence of actual work stoppages directly attributable to the presence of the picket. Thus, employees of Mills, Hansen and Bartlett engaged in partial or total work stoppages during the pendency of the picketing. In addition, it is undisputed that Bartlett and Hansen ceased doing work on the project as a result of the picketing, and that Gladow, who was about to commence work on his subcontract, abandoned the job because of the "legal" picket which had to be honored. That such conduct falls within the proscription of 8(b)(4)(i) and (ii)(B) of the Act is too well settled to require extended discussion. See, e.g., *N.L.R.B.* v. *International Hod Carriers, Local 1140*, 285 F. 2d 397, 400-403 (C.A. 8), cert.

denied, 366 U.S. 903; *N.L.R.B.* v. *Plumbers Union of Nassau County*, 299 F. 2d 497, 500-501 (C.A. 2); *N.L.R.B.* v. *Highway Truckdrivers Local 107*, 300 F. 2d 317, 319-321 (C.A. 3).

2. Respondent's contention before the Board that the termination of the picketing on February 20, 1962, renders the instant proceeding moot, is plainly wrong. *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 98 n. 2; *N.L.R.B.* v. *Local Union No. 751, Carpenters*, 285 F. 2d 633, 638 (C.A. 9).

3. Respondent asserts that the Board erred in denying its motion to reopen the hearing for the purpose of introducing certain evidence [14] which, it alleges, would support its contention that its motive in picketing was to compel Mills to go to arbitration. As we show, the Board's ruling (R. 38, n. 1) was proper.

The record of the District Court proceeding was irrelevant to the instant case, as the Board is required to make its findings of fact and conclusions of law on the basis of the record before it. See, e.g., *Kipbea Baking Company*, 131 NLRB 411, 415. Cf. *Joliet Contractors Assn.* v. *N.L.R.B.*, 202 F. 2d 606, 607 (C.A. 7), cert. denied, 346 U.S. 824, where the record in the District Court injunction proceeding was

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[14] The evidence sought to be introduced consists of two items: (1) the transcript of the hearing in the District Court injunction proceeding (a proceeding which was terminated without decision when the Union agreed to withdraw its picket on Mills' agreement to go to arbitration); and (2) the arbitrator's decision rendered subsequent to the issuance of the Intermediate Report (R. 29-31).

admitted *by stipulation of the parties* and provided the primary basis for the Board's and court's decisions.[15] There is no showing here, as indeed there cannot be, that respondent was denied an opportunity at the hearing to examine and cross-examine witnesses and to introduce pertinent evidence. The arbitrator's decision is similarly irrelevant, as it cannot serve to establish that respondent's sole motive was to compel arbitration. As we have shown above, the fact that one of respondent's objectives may have been to induce Mills to arbitrate cannot serve to justify unlawful secondary activity. See the *Local 1976, Carpenters, Operating Engineers, Local 12, Bangor Bldg. Trades,* and *New York Mailers* cases, cited supra, pp. 16-17.

The evidentiary contention raised by respondent here is substantially identical to one rejected by this Court, in *N.L.R.B.* v. *Washington-Oregon Shingle Weavers,* 211 F. 2d 149. There, the union unsuccessfully sought to introduce evidence of its policy with regard to the union label to demonstrate that its dispute was with the contracting employer, whom it had struck, rather than with the nonunion manufacturer, whom the Board had found to be the primary employer. In upholding the Board's rejection of this proffered evidence, the Court noted that since "the means chosen to achieve that end [protection of the union label] would be contrary to Section 8(b)(4)

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[15] Contrariwise, counsel for the General Counsel consistently objected to the introduction in this case of testimony relating to the District Court proceeding. (R. 32; Tr. 78, 83).

(A) * * * * the offer of proof and the evidence in support thereof, even if established, would not have constituted a defense to the charges made." 211 F. 2d at 151. The Court's holding in that case is applicable here.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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May 1963

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:
* * *

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: * * *

APPENDIX B

Pursuant to Rule 18, section 2 (f), of the Rules of this Court, petitioner presents the following table of exhibits. Page references are to Volume II, transcript of hearing.

EXHIBITS

	Identified	Offered	Received
General Counsel's Exhibits 1A to 1L	6	6	7
General Counsel's Exhibit 2	7–8	8	
General Counsel's Exhibit 3	8	8	8
General Counsel's Exhibit 4	8	8	8
Respondent's Exhibit 1	31,114	114	115

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